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July 2, 2018

David Butler
Hearing Officer
South Carolina Public Service Commission
101 Executive Center Drive
Columbia, SC 29211

RE: Request and Petition for Reconsideration of Order No. 2017-73-H Entered in the Consolidated Docket for Docket Nos. 2017-207-E, 2017-305-E, and 2017-370-E

Dear David:

Joint Applicants South Carolina Electric & Gas Company ("SCE&G") and Dominion Energy, Inc. ("Dominion Energy," or, collectively with SCE&G, "Joint Applicants"), by and through the undersigned counsel and pursuant to S.C. Code of Reg. R. 103-854 and Rule 60(b) of the South Carolina Rules of Civil Procedure, hereby respectfully request and petition for your reconsideration of Order No. 2017-73-H (the "Discovery Order"), which you entered in the above-captioned matter on June 21, 2018. In the alternative, Joint Applicants petition the South Carolina Public Service Commission (the "Commission") to review and reconsider that Discovery Order.

The specific portion of the Discovery Order with respect to which Joint Applicants seek reconsideration is your decision to require SCE&G to produce responses and documents to Office of Regulatory Staff ("ORS") Request 5-25, which reads as follows:

> Please provide all documents provided to the United States Department of Justice, Federal Bureau of Investigation, Securities and Exchange Commission ("SEC"), South Carolina Law Enforcement Division, Office of the Attorney General for the State of South Carolina, and the South Carolina Department of Labor, Licensing and Regulation during 2017 and 2018 as a result of those entities' investigations into matters arising out of the NND project. Provide the documents in the same format as provided to the entities. SEC filings located on its EDGAR database and documents located on the Public Service Commission of South Carolina's website are excluded from this request.

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(ORS Request 5-25.) Joint Applicants seek reconsideration of your ruling requiring SCE&G to produce all documents responsive to this request because that ruling constitutes an impermissible expansion of the scope of permissible discovery pursuant to both the Commission's regulations and Rule 26 of the South Carolina Rules of Civil Procedure.

Discovery in actions pending before the Commission is limited to "***material relevant to the subject matter involved in the pending proceeding*** . . . unless the material is privileged or is hearing preparation working papers prepared for the pending proceeding." S.C. Code of Reg R. 103-833(A) (emphasis added). Thus, the scope of discovery in Commission proceedings mirrors that authorized by Rule 26(b)(1) of the South Carolina Rules of Civil Procedure. S.C.R. Civ. P. 26(b)(1) (stating that parties "may obtain discovery regarding any matter, not privileged, ***which is relevant to the subject matter involved in the pending action***" (emphasis added)). Although "the scope of discovery is broad," the South Carolina Supreme Court has held that "there are limits" to discovery, including that it "must be 'reasonably tailored' to include only relevant matters." *Oncology & Hematology Assocs. Of S.C., LLC v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 380, 387-89, 692 S.E.2d 920, 924-25 (2010). Significantly, less than a month before entry of the Discovery Order in this matter, the South Carolina Court of Common Pleas refused to compel SCE&G's response to nearly identical document requests as exceeding the scope of discovery permitted under Rule 26(b)(1). *See Cleckley v. S. Carolina Elec. & Gas Co.*, Case No. 2017-CP-40-04833.[1]

In *Cleckley v. S. Carolina Elec. & Gas Co.*, an SCE&G ratepayer bringing a purported class action arising out of the NND Project sought production of any documents related to the NND Project that SCE&G previously provided to any party—including federal and state agencies—in response to a subpoena. The Court found that such requests were not reasonably tailored to the matters at issue in that litigation, thereby exceeding the scope of permissible discovery:

> [T]he pivotal issue is relevancy. Relevancy is the linchpin of discovery and is, by definition, material that tends to prove or disprove a matter at issue. That material has been produced to third parties weighs neither for nor against production in the instant case. I do not find a clear nexus between the allegations of Plaintiff's Complaint and the plain language of Plaintiff's discovery requests, and the fact that the requested materials have been produced to third parties establishes no such nexus. SCE&G has represented to the Court that it intends to comply with the mandate of Rule 26, SCRCP. Consequently, and because Plaintiff cannot establish a connection between these requests and the issues in this case, Plaintiff's Motion should be denied.

(*See* Ex. 1 at 3.)

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[1] The Honorable John C. Hayes, III – who was specifically selected by the South Carolina Supreme Court to preside over the class actions brought against SCE&G in connection with the NND Project – orally denied the plaintiff's motion to compel on May 22, 2018, but entered the Court's written decision with respect to that motion on June 28, 2018. A true and accurate copy of that June 28 order is attached hereto and incorporated herein as Exhibit 1.

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Discovery requests like ORS Request 5-25 are often described as "cloned" or "piggybacking" requests because the parties seeking discovery "are attempting to clone the discovery taken by others in unrelated cases and to piggyback on that unrelated discovery." *Wollam v. Wright Med. Grp.*, No. 10-CV-03104-DME-BNB, 2011 WL 1899774, at *1 (D. Colo. May 18, 2011). South Carolina courts are not alone in refusing to enforce such requests. *See, e.g.*, *Racing Optics v. Aevoe Corp.*, No. 2:15-CV-1774-RCJ-VCF, 2016 WL 4059358, at *1 (D. Nev. July 28, 2016) ("'Piggyback' discovery requests are prohibited."); *Wollam*, 2011 WL 1899774, at *1 ("I agree with the many courts that have considered the question and have held that cloned discovery is not necessarily relevant and discoverable."); *Midwest Gas Servs. Inc. v. Ind. Gas Co., Inc.*, No. IP99-0690-C-Y/G, 2000 WL 760700, at *1 (S.D. Ind. Mar. 7, 2000) (refusing to compel production of documents provided to the United States in response to a civil investigative demand absent a showing of relevance to the action at hand); *Chen v. Ampco Sys. Parking*, No. 08-CV-0422-BEN (JMA), 2009 WL 2496729, at *2 (S.D. Cal. Aug. 14, 2009) (holding that the defendant "appropriately object[ed] to Plaintiff's 'attempt to piggyback on the discovery conducted in the state cases without a sufficient showing of relevance'"); *Moore v. Morgan Stanley & Co., Inc.*, No. 07 C 5606, 2008 WL 4681942, at *5 (N.D. Ill. May 30, 2008) ("[J]ust because the information was produced in another lawsuit . . . does not mean that it should be produced in this lawsuit."); *Oklahoma v. Tyson Foods, Inc.*, No. 05-CV-329-TCK-SAJ, 2006 WL 2862216, at *1-2 (N.D. Okla. 2006) (denying a motion to compel the production of documents made available "in a similar poultry waste pollution lawsuit previously brought in this Court" absent a showing of more than "surface similarities" between the cases); *Payne v. Howard*, 75 F.R.D. 465, 469 (D.D.C. 1977) (stating that "[w]hether pleadings in one suit are 'reasonably calculated' to lead to admissible evidence in another suit is far from clear" and that such a determination requires consideration of "the nature of the claims, the time when the critical events in each case took place, and the precise involvement of the parties, among other considerations").

As the *Cleckley* Court found, cloned or piggybacking document requests are not enforceable absent proof of a nexus between the allegations in the case at hand and the documents produced in the other action(s) from which they are being sought. (*See* Ex. 1 at 3.) The reasoning for this is simple. A cloned discovery request seeks not only documents that are relevant to the subject matter involved in the pending action, but also all documents that were produced in—and thus relevant to—a separate legal action. It is unlikely that two separate legal actions are completely coterminous. In fact, it is a virtual certainty that comparing two legal actions—even two actions involving identical parties—will reveal at least some factual and legal issues that are uniquely raised in one action, but not the other. Thus, information and documents regarding these unique issues would be discoverable in one of those actions, but not the other. Said differently, permitting a cloned discovery request—like ORS Request 5-25—has the effect of rewriting S.C. Code of Reg. R. 103-833(A) to permit discovery of "materials relevant to the subject matter involved in the pending proceeding, ***or any other proceeding involving the party from whom discovery is sought***," or of rewriting Rule 26(b)(1) to permit discovery of matters "relevant to the subject matter involved in the pending action ***or any other action involving the party from whom discovery is sought***." There is no legal basis for such an unwarranted expansion of a party's discovery obligations, especially where, as here, ORS has failed to make

any showing of a nexus between the documents requested in ORS Request 5-25 and the allegations at issue in this case.

As has been publicly disclosed, the criminal and regulatory investigations are sweeping in scope, and they relate to matters that have at best a limited connection to the Project if any. For instance, the Securities and Exchange Commission has sought documents that relate to information provided to investors in quarterly earnings calls, regardless of whether it related to the Project. ORS does not even attempt to describe how documents produced in these unrelated investigations are connected to the issues before the PSC in this matter. Of course, ORS has is not a party to the investigations whose discovery ORS seeks to clone. For that reason, ORS has no ability to represent that the discovery in those matters is in fact relevant to the issues in this proceeding. ORS is shooting in the dark. This is not permitted.For the reasons set forth herein, and for the reasons set forth in Joint Applicants' "Response to Motion to Compel Discovery Responses and Production by SCE&G and Dominion Energy," Joint Applicants respectfully request that the Commission reconsider that portion of the Discovery Order requiring SCE&G to provide a full and complete response to ORS Request 5-25, and determine that that request exceeds the scope of permissible discovery under South Carolina law. Joint Applicants also request a stay of such production of documents responsive to ORS Request 5-25 until the Commission issues an order on this Request.

Respectfully submitted,

/s/ Belton T. Zeigler

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